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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT1 NOT FOR PUBLICATION  
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34 UNITED STATES BANKRUPTCY APPELLATE PANEL  
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6 OF THE NINTH CIRCUIT

In re: )  
ALICE MICHELLE MERENA, ) BAP No. MT-08-1342-PaDH  
Debtor. ) BAP No. MT-09-1093-PaDH  
              ) (consolidated)  
              ) Bk. No. 08-60066  
KENNETH MERENA; YU ZHAO, ) Adv. No. 08-00046  
Appellants, )  
v. ) MEMORANDUM<sup>1</sup>  
ALICE MICHELLE MERENA, )  
Appellee. )

Argued and submitted on November 19, 2009  
at Pasadena, California

Filed - December 10, 2009

Appeal from the United States Bankruptcy Court  
for the District of Montana

Honorable Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding

Before: PAPPAS, DUNN, and HOLLOWELL, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication.

Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8013-1.

Appellants Kenneth Merena ("Kenneth") and Yu Zhao ("Zhao") appeal the bankruptcy court's order denying their motion to bifurcate the trial of their 11 U.S.C. §§ 523(a)<sup>2</sup> and 727(a) claims; its judgment dismissing their § 523(a)(6) claim after they failed to produce any evidence in support of the claim at trial; and its judgment against them after trial dismissing their objection to discharge claim under § 727(a)(4). We AFFIRM.

## FACTS

9 Kenneth and Appellee Alice Michele Merena ("Alice") were  
10 married in Utah in June 2006. The marriage was short-lived;  
11 Alice filed for a divorce from Kenneth on August 20, 2007.

12 Zhao alleges that after Alice and Kenneth separated, she  
13 persuaded him to lend her a small amount of cash for a motel room  
14 so Alice could have time alone to consider her predicament (the  
15 "Zhao Loan").

Alice and Kenneth never reconciled. Instead, on October 22, 2007, Kenneth sued Alice in Utah state court, alleging that Alice libeled and slandered him by telling his friend, Zhao, as well as others, that Kenneth was unfaithful during their marriage. Merena v. Merena, Case No. 070915306 (3rd Jud. Dist., Salt Lake County, October 22, 2007) ("Utah Libel Action").

25       <sup>2</sup> Unless specified otherwise, all references are to the  
26 Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules  
of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of  
27 Civil Procedure are referred to as Civil Rules.

1       On January 30, 2008, Alice filed a chapter 13 bankruptcy  
2 petition in Montana. In her original schedules, she did not  
3 reference three pending legal actions in which she was involved:  
4 her divorce action, a cohabitant abuse proceeding she had  
5 commenced against Kenneth, and a custody proceeding initiated by  
6 her ex-husband, Ryan Gravely. She also did not list payments  
7 made by her parents to her divorce attorney, nor the resulting  
8 credit balance in her account at the law firm. Finally, Alice  
9 did not list several items of personal property in her asset  
10 schedules, namely, a \$379.18 Roth IRA, a 19-inch television, a  
11 laptop computer, and an iPod. She later informed the trustee  
12 about the omitted items and, on December 11, 2008, she amended  
13 her schedules and the Statement of Financial Affairs ("SOFA") to  
14 include the missing information.

15       Kenneth sought relief from the automatic stay to pursue the  
16 Utah Libel Action by motion filed in the bankruptcy court on  
17 March 22, 2008. Alice filed no response to the motion, and the  
18 bankruptcy court granted stay relief so that the Utah Libel  
19 Action could proceed to judgment.

20       On April 11, 2008, Alice converted her bankruptcy case to  
21 chapter 7. Joseph Womack ("Trustee") was appointed the chapter 7  
22 trustee.

23       On June 27, 2008, Kenneth and Zhao jointly commenced an  
24 adversary proceeding against Alice. The complaint included five  
25 separate claims for relief. In two of those claims, Kenneth and  
26 Zhao alleged that their claims against Alice should be excepted  
27

1 from discharge. Kenneth asserted his slander/libel claim was  
2 nondischargeable under § 523(a)(6) as a willful and malicious  
3 injury. Zhao alleged the debt for the Zhao Loan should be  
4 excepted from discharge under § 523(a)(2)(A) because Alice  
5 obtained the loan from him by fraud. In the other three claims,  
6 Kenneth and Zhao alleged that Alice's discharge should be denied  
7 pursuant to §§ 727(a)(3), (a)(4), and (a)(6)(C).

8 On July 16, 2008, Alice filed a motion for injunctive relief  
9 in the bankruptcy court seeking to have the Utah Libel Action  
10 stayed pending the outcome of the trial in the adversary  
11 proceeding. At a hearing on the motion, in an oral decision, the  
12 bankruptcy court announced its intention to deny Alice's motion  
13 and, instead, to stay the adversary proceeding pending the  
14 conclusion of the Utah Libel Action. In a later written  
15 memorandum of decision entered on August 28, the bankruptcy court  
16 again denied Alice's motion because it found the motion was  
17 essentially an attempt to seek reconsideration of the court's  
18 prior order granting Kenneth's motion to modify the automatic  
19 stay, to which Alice had failed to respond. However, in an  
20 apparent change of position, the bankruptcy court concluded that  
21 it would not stay the adversary proceeding as previously  
22 announced, and ordered that the trial in the adversary proceeding  
23 proceed as originally scheduled. In the meantime, in an order  
24 entered on August 20, the bankruptcy court set trial in the  
25 adversary proceeding to commence on December 16, 2008.

On October 8, 2008, Kenneth and Zhao filed a motion to bifurcate the trial. Specifically, they sought to bifurcate the trial of the § 727(a) objections to discharge claims from their respective § 523(a) claims, and to continue the December 16 trial on the § 523(a) claims. Kenneth argued that he would be prejudiced if he were forced to try his tort claims in bankruptcy court because, among other things, he would be denied adequate time to do discovery and he was concerned his Utah witnesses would be unwilling to come to Montana to testify. The bankruptcy court entered its decision and order denying the motion to bifurcate on November 19, 2008.

12 On December 9, 2008, Alice, Kenneth and Zhao approved and  
13 submitted a proposed Final Pretrial Order to the bankruptcy  
14 court. The order was comprehensive and listed, inter alia, the  
15 unresolved issues of fact and law, the contested elements of  
16 liability and defenses, and included the parties' witness and  
17 exhibit lists. The next day, Kenneth and Zhao filed a motion to  
18 supplement their witness list. On December 11, 2008, the  
19 bankruptcy court entered its order approving the Final Pretrial  
20 Order, making some minor modifications as to the applicable legal  
21 standards. The same day, the bankruptcy court denied Kenneth's  
22 and Zhao's motion to supplement their witness list.<sup>3</sup>

As scheduled, on December 16, 2008, the trial in the adversary proceeding began. Kenneth, Zhao, Alice and Trustee appeared and were represented by counsel. At that time, counsel for Kenneth and Zhao informed the bankruptcy court that because of the procedural developments in this action, they would not offer any proof on Kenneth's § 523(a)(6) claim. At that point Alice's counsel requested, and bankruptcy court granted, what they referred to as a "directed verdict" dismissing Kenneth's claim. On December 17, 2008, the bankruptcy court entered an order explaining the reasons for its ruling and a separate judgment against Kenneth and Zhao, and in favor of Alice, dismissing the § 523(a)(6) claim.<sup>4</sup>

13 The trial on the remaining claims in the complaint,  
14 proceeded, with Kenneth participating via video conference from

<sup>3</sup> ( . . . continued)

16 unknown)". The court noted that it had entered a written order  
17 on August 20, 2008, that the witness and exhibit lists be  
18 submitted no later than December 9, 2008. As indicated above, on  
19 December 9, the parties submitted their final PTO with the lists  
20 of exhibits and witnesses. Also on December 9, Kenneth and Zhao  
21 submitted a request for a one-day extension to add exhibits,  
22 which the court granted. However, the court ruled that they had  
23 not timely requested an extension of the witness list, that their  
24 filing of a request for extension of the exhibit list demonstrated their knowledge of the court's scheduling order, and thus they failed to take the "appropriate steps to extend the deadline for identifying witnesses." The court's order found "no good reason to depart from its longstanding rule that Orders of this Court must be complied with, and complied with in a timely manner."

25       <sup>4</sup> Of course, since the § 523(a)(6) was premised solely on  
26 Kenneth's tort claims against Alice, it was inappropriate for the  
27 bankruptcy court to enter judgment against Zhao in dismissing  
this claim. We consider this oversight to be harmless.

1 Utah. At the end of the day, the proof had not been completed,  
2 so the trial was continued to February 10, 2009.

3 On December 24, 2008, Kenneth and Zhao filed their first  
4 notice of appeal, targeting the bankruptcy court's entry of  
5 judgment against them on the § 523(a)(6) claim.

6 The trial reconvened on February 10, 2009, with all parties  
7 appearing. The presentation of evidence was completed and the  
8 bankruptcy court took the issues under advisement.

9 On March 10, 2009, the bankruptcy court issued a lengthy  
10 memorandum of decision, in which it made factual findings and  
11 concluded that Kenneth and Zhao had failed to satisfy their  
12 burdens of proof on the remaining § 523(a) and § 727(a) claims.  
13 The same day, a judgment was entered by the bankruptcy court in  
14 favor of Alice and against Kenneth and Zhao, dismissing the  
15 adversary complaint with prejudice.

16 On March 18, 2009, Kenneth and Zhao filed a second notice of  
17 appeal, contending that the bankruptcy court erred in both  
18 denying the motion to bifurcate the trial, as well as in its  
19 finding that they failed to prove their claims under  
20 § 727(a)(4).<sup>5</sup>

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23       <sup>5</sup> Kenneth and Zhao listed several additional issues in  
24 their second appeal, but have briefed none of them. As a result,  
25 any assertions of error by the bankruptcy court concerning those  
issues have been waived. Alacaraz v. INS, 384 F.3d 1150, 1161  
(9th Cir. 2004); Int'l Ass'n of Firefighters, Local 1186 v. City  
26 of Vallejo (In re City of Vallejo), 408 B.R. 280, 291 (9th Cir.  
BAP 2009). The Panel therefore considers only those issues  
27 discussed below.

The Panel consolidated the two appeals in an order entered on April 23, 2009.

## ISSUES

1. Whether the bankruptcy court abused its discretion in denying Appellants' motion to bifurcate the trial of the § 523(a) claims from the § 727(a) claims.
  2. Whether the bankruptcy court erred in dismissing Kenneth's § 523(a)(6) exception to discharge claim.
  3. Whether the bankruptcy court erred in finding that Appellants had not satisfied their burden of proof on the § 727(a)(4)(A) claim.

We review a bankruptcy court's decision to deny a motion to bifurcate the trial for abuse of discretion. M2 Software, Inc. v. Madacy Entm't., 421 F.3d 1073, 1088 (9th Cir. 2005) (citing Danjaq LLC v. Sony Corp., 263 F.3d 942, 961 (9th Cir. 2001)). A

<sup>6</sup> The order and judgment granting the "directed verdict" against Kenneth on his § 523(a)(6) claim which are the subject of the first appeal in BAP No. MT-08-1342 was obviously not a final order, as it did not resolve all of Kenneth's claims against Alice in the adversary proceeding. Absent a certification by the bankruptcy court under Civil Rule 54(b), as incorporated by Rule 7054, the bankruptcy court's decision could only be appealed with permission of the Panel. 28 U.S.C. § 158(a)(3). However, a final judgment has now been entered by the bankruptcy court resolving all claims raised in the adversary proceeding, that judgment has been appealed to the Panel in BAP No. MT-09-1093, and we have consolidated the two appeals. We therefore have jurisdiction over all the issues raised by Appellants.

1 two-part test must be applied to determine if an abuse of  
2 discretion has occurred: (1) we review de novo whether the  
3 bankruptcy court identified the correct legal rule to apply to  
4 the relief requested; (2) we review for abuse of discretion  
5 whether the trial court's application of the correct legal  
6 standard was illogical, implausible or without support in  
7 inferences that may be drawn from the facts in the record.

8 United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009).

9 After Kenneth's counsel announced at trial that no evidence  
10 would be offered in support of Kenneth's § 523(a)(6) claim,  
11 Alice's counsel moved the bankruptcy court for "a directed  
12 verdict." A directed verdict is more properly applicable to  
13 actions tried before a jury, not bench trials. As the Panel  
14 explained in Kuan v. Lund (In re Lund), 202 B.R. 127 (9th Cir.  
15 BAP 1996), under these circumstances, such motions are considered  
16 "motions for a judgment based on partial findings, and are  
17 governed by [Civil Rule] 52(c) . . ." made applicable in  
18 adversary proceedings by Rule 7052. 202 B.R. at 129 (citations  
19 omitted).<sup>7</sup> The trial court's findings of fact under Civil  
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21  
22       <sup>7</sup> "Judgment on Partial Findings. If a party has been fully  
23 heard on an issue during a nonjury trial and the court finds  
24 against the party on that issue, the court may enter judgment  
25 against the party on a claim or defense that, under the  
controlling law, can be maintained or defeated only with a  
favorable finding on that issue. The court may, however, decline  
to render any judgment until the close of the evidence. A  
judgment on partial findings must be supported by findings of  
fact and conclusions of law as required by Rule 52(a)." Civil  
Rule 52(c).

1 Rule 52(c) are reviewed for clear error, while its conclusions of  
 2 law are reviewed de novo. Id.

3 Finally, the standard of review for a bankruptcy court's  
 4 decision concerning a § 727(a) objection to discharge is that:  
 5 "(1) the court's determinations of the historical facts are  
 6 reviewed for clear error; (2) the selection of the applicable  
 7 legal rules under § 727 is reviewed de novo; and (3) the  
 8 application of the facts to those rules is reviewed de novo."

9 Searles v. Riley (In re Searles), 317 B.R. 368, 373 (9th Cir. BAP  
 10 2004) (citing Beauchamp v. Hoose (In re Beauchamp), 236 B.R. 727,  
 11 729-30 (9th Cir. BAP 1999)).

## DISCUSSION

### I. Motion to Bifurcate.

14 Kenneth and Zhao contend that the bankruptcy court should  
 15 have ordered that the issues at trial be bifurcated, and that the  
 16 § 523(a) claims be tried separately from § 727(a) claims. They  
 17 argue that to force them to try the libel and slander issues at  
 18 the December 16, 2008 bankruptcy court trial prejudiced their  
 19 ability to conduct discovery or present an adequate case, and  
 20 deprived them of the benefit of the stay relief they had been  
 21 previously granted by the bankruptcy court.

22 Civil Rule 42(b), incorporated by Rule 7042, "confers broad  
 23 discretion upon the [bankruptcy] court to bifurcate a trial,  
 24 thereby deferring costly and possibly unnecessary proceedings[.]"  
 25 Hangarter v. Provident Life and Acc. Ins. Co., 373 F.3d 998, 1021  
 26 (9th Cir. 2004) (quoting Zivkovic v. S. Cal. Edison Co., 302 F.3d

1 1080, 1088 (9th Cir. 2002)). Civil Rule 42 allows, but does not  
2 require, bifurcation to avoid prejudice to a party or to promote  
3 judicial economy. Houseman v. U.S. Aviation Underwriters,  
4 171 F.3d 1117, 1121 (7th Cir. 1999). Either consideration can  
5 justify a trial court's decision to bifurcate a trial. However,  
6 the bankruptcy court here explicitly found that neither condition  
7 applied.

8 The bankruptcy court noted that the Utah Libel Action had  
9 not been set for trial, and that a trial would therefore not  
10 likely occur until some time in the future. The bankruptcy court  
11 stated:

12 Forcing the parties to litigate the § 727  
13 claim before this Court in December, litigate  
the Utah claim at an indeterminate date, and  
then return to this Court to litigate the  
14 dischargeability of any potential judgment in  
favor of the Plaintiffs in the Utah  
15 litigation does nothing but increase  
litigation costs for all parties.

16 Memorandum of Decision (November 19, 2008). The bankruptcy court  
17 could hear and decide Kenneth's slander and libel claims in  
18 connection with the § 523(a) exceptions to dischargeability.

19 Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 869-70 (9th Cir.  
20 2005) (citing Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015,  
21 1017-18 (9th Cir. 1997)). And, as the court noted, under  
22 § 523(c), the bankruptcy court has exclusive jurisdiction to  
23 determine the dischargeability of Kenneth's claim under  
24 § 523(a)(6)(C). Therefore, the bankruptcy court concluded it  
25 would be a more efficient use of judicial resources and would  
26 promote economy to go forward on all claims in the bankruptcy

1 court. Additionally, in order to afford her a "fresh start," the  
2 bankruptcy court found that continued delays in deciding the  
3 issues raised in the adversary proceeding were potentially  
4 prejudicial to Alice. Thus, the bankruptcy court found that  
5 neither consideration required by Civil Rule 42(b) justified  
6 bifurcation.

7 The bankruptcy court correctly identified the applicable  
8 rule of law in deciding Appellants' motion to bifurcate the  
9 trial. It then properly applied that rule to the facts, and its  
10 conclusion that the trial of the § 523(a) and § 727(a) claims  
11 need not be bifurcated was neither illogical, implausible nor  
12 without support in the inferences that may be drawn from the  
13 facts in the record. In short, the bankruptcy court did not  
14 abuse its discretion by refusing to bifurcate the trial.

## 15 II. Dismissal of the § 523(a)(6) claim.

16 Section 523(a)(6) provides that: "A discharge under section  
17 727 . . . of this title does not discharge an individual debtor  
18 from any debt: - . . . (6) for willful and malicious injury by the  
19 debtor to another entity or to the property of another entity." The  
20 aggrieved party must present evidence that the debtor:  
21 (a) willfully injured the creditor or the creditor's property,  
22 i.e., caused a "deliberate or intentional injury, not merely a  
23 deliberate or intentional act that leads to injury." Kawaauhau  
24 v. Geiger, 523 U.S. 57, 61 (1998); and (b) the injury was  
25 malicious, i.e., a wrongful act, done intentionally, which  
necessarily causes injury, and is done without just cause or  
excuse. Carillo v. Su (In re Su), 290 F.3d 1140, 1146-47

1 (9th Cir. 2002). These two elements must be proven  
2 independently. Albarran v. New Form, Inc. (In re Barboza),  
3 545 F.3d 702, 706 (9th Cir. 2008). Kenneth offered no proof on  
4 either element. Rather than prove the required elements for a  
5 prima facie case, at the beginning of the trial on the adversary  
6 proceeding, Kenneth's counsel informed the bankruptcy court that  
7 he would offer no proof in support of his § 523(a)(6) claim.

8 Kenneth argues that the actions of the bankruptcy court  
9 prevented him from proving his claim. The crux of that claim was  
10 that the libel and slander allegedly committed by Alice in her  
11 statements to others about Kenneth "willfully, intentionally and  
12 maliciously interfered with Kenneth's existing and/or prospective  
13 economic relations." Alice's response to Appellants' statements  
14 was to request that the bankruptcy court dismiss the § 523(a)(6)  
15 claim. The bankruptcy court granted that request and dismissed  
16 the claim.

17 Kenneth's argument may be fairly summarized as follows: the  
18 bankruptcy court originally granted him stay relief so that the  
19 Utah Libel Action could be prosecuted and tried in state court.  
20 The bankruptcy court then essentially reversed course when it  
21 later ordered that the § 523(a)(6) claim proceed to trial along  
22 with the Appellants' other claims raised in the adversary  
23 complaint. When the bankruptcy court denied Kenneth and Zhao's  
24 bifurcation motion, they were forced to "fashion a proposed  
25 witness list on all claims in a very short time period without  
26 the benefit of discovery." Finally, when the bankruptcy court  
27 did not allow them to supplement their witness list, they were

1 prevented from calling important witnesses at trial, and elected  
2 not to present any proof on the § 523(a)(6) claim whatsoever.

3 To address this argument, a review of the facts in  
4 chronological context is useful.

5 On April 8, 2008, the bankruptcy court modified the stay to  
6 allow the State Court Action to proceed. On June 27, 2008,  
7 Kenneth and Zhao filed the complaint initiating the adversary  
8 proceeding. On August 20, 2008, the bankruptcy court entered its  
9 scheduling order in the adversary proceeding, setting a trial  
10 date on December 16, 2008. The next day, August 21, 2008, in a  
11 hearing, the court indicated that it would hold all adversary  
12 proceedings in abeyance pending outcome of the Utah Libel Action.  
13 However, seven days later, in a written memorandum of decision,  
14 the bankruptcy court reconsidered its oral decision and ordered  
15 that the trial go forward on all claims on December 16.

16 Thereafter, Kenneth and Zhao, upon discovering that their  
17 discovery efforts "were not going forward as quickly as planned"  
18 moved to bifurcate the § 523(a) and § 727(a) claims on October 8,  
19 2008. Their motion to bifurcate was denied on November 19, 2008.

20 In its December 17, 2008 order granting Alice's motion to  
21 dismiss the § 523(a)(6) claim, after carefully reviewing the  
22 Ninth Circuit case law articulating the required elements for an  
23 exception to discharge, the bankruptcy court correctly placed the  
24 burden of proving the existence of those elements on Kenneth as  
25 the creditor. Albarran v. New Form, Inc. (In re Barboza),  
26 347 B.R. 369, 379 (9th Cir. BAP 2007) ("[T]here is a presumption  
27 that all debts are dischargeable unless a party who contends

1 otherwise proves, with competent evidence, an exception to  
2 discharge."), rev'd on other grounds, 545 F.3d 702 (9th Cir.  
3 2008); see also Brown v. Felsen, 442 U.S. 127, 128, 99 S. Ct.  
4 2205, 60 L.Ed.2d 767 (1979). The bankruptcy court found that  
5 Kenneth had "every opportunity to litigate [the § 523(a)(6)]  
6 claim, and elect[ed] not to offer any exhibits on said claim or  
7 call any witnesses with respect to said claim[.]" Order at 1-2  
8 (December 17, 2008). The court found that Kenneth had "wholly  
9 failed to prove [his] claim under 11 U.S.C. § 523(a)(6)."

10 Id. at 4. As a result, the bankruptcy court concluded judgment  
11 should be entered in favor of Alice regarding that claim.

12 Kenneth's argument that he did not have a fair opportunity  
13 to prove his claim lacks merit. Kenneth was granted relief from  
14 the stay to commence (or resume) discovery in the Utah Libel  
15 Action, on April 8, 2008. In June, Kenneth commenced the  
16 adversary proceeding, thereby creating an additional opportunity  
17 to pursue discovery. There is no indication in the record that  
18 Kenneth sought to compel discovery in the adversary proceeding,  
19 nor that he requested a continuance or delay of the trial to  
20 prepare for trial until after he lost the bifurcation motion. He  
21 was aware from and after entry of the scheduling order on  
22 August 20, 2008, and the bankruptcy court's decision denying  
23 Appellants' motion for injunctive relief on August 28, that the  
24 trial was to commence on December 16 on all counts. In short,  
25 Kenneth had an ample opportunity to conduct discovery and prepare  
26 his case for trial.

Under these facts, we find no clear error in the bankruptcy court's findings and conclusions that Kenneth failed to prove his claim, and in its decision to dismiss the § 523(a)(6) claim, when Kenneth announced at the beginning of the trial, without advance warning to the bankruptcy court, that he would not offer any proof on this claim.

### III. The § 727(a)(4) Claim.

Kenneth and Zhoa contend that the bankruptcy court erred in dismissing their claim against Alice to deny her a discharge under § 727(a)(4)(A).<sup>8</sup> We conclude no error was committed.

"A claim for denial of discharge is construed liberally and in favor of the discharge and strictly against a person objecting to the discharge." Roberts v. Erhard (In re Roberts), 331 B.R. 876, 882 (9th Cir. BAP 2005) (citing First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342 (9th Cir. 1986)). After taking into consideration this public policy, a discharge may be denied under § 727(a)(4)(A) if the debtor knowingly and fraudulently makes a false oath or account in the course of the bankruptcy case.<sup>9</sup> A false statement or an omission in the debtor's bankruptcy schedules or statement of financial affairs can constitute a false oath. Kahlil v. Developers Sur. & Indem. Co. (In re Khalil), 379 B.R. 163, 172 (9th Cir. BAP 2007), aff'd

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<sup>8</sup> Kenneth and Zhoa did not appeal the decision of the bankruptcy court dismissing their remaining § 727(a) claims.

<sup>9</sup> "The court shall grant the debtor a discharge, unless . . . (4) the debtor knowingly and fraudulently, in or in connection with the case - (A) made a false oath or account[.]" § 727(a)(4)(A).

1 578 F.3d 1167 (9th Cir. 2009); Roberts v. Erhard (In re Roberts),  
2 331 B.R. 876, 882 (9th Cir. BAP 2005), aff'd, 241 Fed. Appx. 420  
3 (9th Cir. 2006). To succeed on a claim for denial of discharge  
4 under § 727(a)(4)(A), the proponent must show by a preponderance  
5 of the evidence that: (1) Debtor made such a false statement or  
6 omission, (2) regarding a material fact, and (3) did so knowingly  
7 and fraudulently. In re Roberts, 331 B.R. at 882.

8 "The fundamental purpose of § 727(a)(4)(A) is to insure that  
9 the trustee and creditors have accurate information without  
10 having to conduct costly investigations." Fogal Legware of  
11 Switz., Inc. v. Wills (In re Wills), 243 B.R. 58, 63 (9th Cir.  
12 BAP 1999) (citing Aubrey v. Thomas (In re Aubrey), 111 B.R. 268,  
13 274 (9th Cir. BAP 1990)). But a false statement or omission that  
14 has no impact on a bankruptcy case is not material and does not  
15 provide grounds for denial of a discharge under § 727(a)(4)(A).  
16 In re Khalil, 379 B.R. at 172.

17 Several pages of the bankruptcy court's extensive memorandum  
18 of decision were devoted to its findings, conclusions, and  
19 reasons supporting its decision to deny Appellants' objection to  
20 discharge. The bankruptcy court found the following facts  
21 relevant to its decision to dismiss Appellants' § 727(a)(4)(A)  
22 claim.

23 In her original schedules, Alice failed to list three  
24 pending legal actions: her divorce action, a cohabitant abuse  
25 proceeding against Kenneth, and a custody proceeding initiated by  
26 her ex-husband, Ryan Gravely. She also failed to list two  
27 payments to her divorce attorney: a \$1,500 payment on

1 August 20, 2007 and a \$5,000 payment on November 8, 2007. Both  
2 payments were made by her parents, and resulted in a \$4,454.93  
3 credit balance in her account at the law firm.

4 Alice further did not list certain items of personal  
5 property, namely, a Roth IRA worth \$379.18, a 19-inch television,  
6 a laptop computer, and an iPod. She later informed the trustee  
7 about the omitted items, and on December 11, 2008, she amended  
8 her schedules and the SOFA to include the items.

9 Alice testified that she did not list the pending lawsuits  
10 on the SOFA because she misunderstood the requirements of that  
11 form, and thought she need only list actions with a financial  
12 impact on her finances or the bankruptcy case. Trustee testified  
13 at trial that while the lawsuits should have been listed, they  
14 were not particularly important in Alice's case because they did  
15 not involve claims that belonged to the bankruptcy estate which  
16 could generate any recovery for the creditors.

17 With regard to the items of personal property omitted from  
18 her schedules, Alice testified that the television was a  
19 postpetition gift from her mother to Alice's children, and that  
20 the laptop did not work. She testified that she simply  
21 overlooked listing the Roth IRA and the iPod in her schedules.

22 In addition, Alice amended her schedules to include one  
23 omitted obligation for \$1,500 to Oculoplastic Surgery.

24 Kenneth and Zhao contend that Alice undervalued her 2003  
25 Honda Civic in her schedules, but Trustee found her valuation to  
26 be reasonable after inspecting the vehicle and consulting the  
27 NADA and Kelly Blue Book values.

1 Kenneth and Zhao also argue that Alice failed to disclose  
2 the sale of her condominium in her SOFA, and that she failed to  
3 account for \$23,723.03 in proceeds from that sale. The  
4 bankruptcy court found that Alice spent approximately half of the  
5 sale proceeds on living expenses, and used the balance to repay a  
6 loan to her parents for money they provided as a down payment on  
7 the condo. The court found that Alice failed to list the condo  
8 sale "out of ignorance of the Bankruptcy Code." Memorandum of  
9 Decision at 38 (March 10, 2009). It noted that Trustee was aware  
10 of the sale of the condo and that the court "deem[ed] it  
11 significant that [Trustee] appeared and testified that he saw  
12 nothing out-of-the-ordinary in this case that would warrant a  
13 proceeding to deny Alice's discharge." Id. at 19, 31.  
14 The only omission from the schedules and SOFA of concern to  
15 Trustee related to the payments made to Alice's divorce attorney,  
16 which he indicated he would investigate more thoroughly. He  
17 testified that debtors in bankruptcy frequently forget to  
18 schedule all their assets as well as all of their debts. He  
19 noted that Alice was forthcoming about the omitted assets at the  
20 § 341(a) creditors meeting, and that she ultimately amended her  
21 schedules to correct those omissions.

22 Kenneth and Zhao also argued that Alice's average monthly  
23 income on her Statement of Monthly Net Income did not match her  
24 gross income on schedule I, or her monthly income shown on Form  
25 22C. However, not only did Alice explain the discrepancy, but the  
26 bankruptcy court noted that despite the inaccuracy, Alice's  
27 annualized current monthly income was below Montana's applicable  
28

1 median income, and thus of no material impact in the bankruptcy  
 2 case.

3 Kenneth and Zhao listed a host of other alleged inaccuracies  
 4 in Alice's schedules, including her valuation of a pair of skis,  
 5 Alice's obligation on a promissory note for \$10,400, the failure  
 6 to produce requested documents, and her taking of certain items  
 7 from the marital home when she moved out. The bankruptcy court  
 8 determined that Kenneth and Zhao had not proven that any of these  
 9 alleged inaccuracies and omissions were material.

10 Finally, Kenneth and Zhao alleged Alice had omitted mention  
 11 of a leather jacket, her former husband's pension fund, the sale  
 12 of a condominium, and domestic violence charges against Alice,  
 13 which were later dismissed, as a basis for denial of discharge  
 14 under § 727(a)(4)(A). The bankruptcy court noted that Trustee  
 15 "saw nothing of concern in Alice's schedules and [Trustee] stated  
 16 that he had no reason to bring a motion to dismiss for abuse and  
 17 no reasons existed in [Trustee's] opinion for [Trustee] to seek  
 18 denial of Alice's discharge." Memorandum of Decision at 17.

19 The bankruptcy court fully addressed each of the major  
 20 inaccuracies cited by Appellants, analyzing them under the  
 21 Roberts test. After doing so, the bankruptcy court found that

22 . . . Plaintiffs failed their burden of proof by a  
 23 preponderance of the evidence by failing to show  
 24 knowing and fraudulent false oaths and omissions in  
 25 Alice's Schedules and SOFA. . . . In particular, the  
 Plaintiffs have not shown fraudulent intent through a  
 pattern of falsity, reckless indifference to and  
 disregard of the truth, and demonstrated course of  
 conduct.

26 Moreover, in addition to failing to prove that  
 27 Alice's omissions and errors on her Schedules and SOFA  
 were done knowingly and with fraudulent intent, the

1 Plaintiffs failed to show that such omissions were  
2 material. The Trustee testified that the omitted  
3 assets had little value and had no impact on the  
4 bankruptcy case. Similarly, the omitted lawsuits bear  
no relationship to Alice's bankruptcy estate and do not  
concern business dealings or the existence and  
disposition of Alice's property.

5 Memorandum of Decision at 39 (March 10, 2009).

6 In sum, the bankruptcy court found and concluded that  
7 Alice's omissions from her bankruptcy schedules and SOFA were not  
8 motivated by any intent to hide assets or defraud her creditors,  
9 and that the information omitted was not "material" for purposes  
10 of § 727(a)(4)(A). In re Roberts, 331 B.R. at 882. The  
11 bankruptcy court's findings of fact were supported by the  
12 evidence and testimony, and were not clearly erroneous. The  
13 court applied the correct rule of law to those facts, and it did  
14 not err in the conclusions it reached. We therefore conclude  
15 that the bankruptcy court did not err in rejecting Appellants'  
16 objection to discharge under § 727(a)(4)(A).

17 **CONCLUSION**

18 We AFFIRM the bankruptcy court's decisions in all respects.

## **U.S. Bankruptcy Appellate Panel of the Ninth Circuit**

125 South Grand Avenue, Pasadena, California 91105  
Appeals from Central California (626) 229-7220  
Appeals from all other Districts (626) 229-7225

### **NOTICE OF ENTRY OF JUDGMENT**

**BAP No.: MT-08-1342-PaDH & MT-09-1093-PaDH (Consolidated Appeals)**

**RE: ALICE MIKCHELLE MERENA**

A separate Judgment was entered in this case on **12/10/2009**.

#### **BILL OF COSTS:**

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. 9th Cir. BAP Rule 8014-1

#### **ISSUANCE OF THE MANDATE:**

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

#### **APPEAL TO COURT OF APPEALS:**

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$455 filing fee and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this certificate appears was transmitted this date to all parties of record to this appeal.

**By:** Vincent Barbato, Deputy Clerk

**Date:** December 10, 2009